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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

In the Matter of the Petition
of
WILLS LINES, INC.,
for exemption from, or limitation of, liability,
Petitioner,

TANKPORT TERMINALS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY D. GRAHAM,
Counsel for Petitioner,
76 Beaver Street,
New York 5, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Wills Lines, Inc., prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York sitting in admiralty denying petitioner leave to surrender its vessel and her pending freights to a Trustee (R. 371-372, Noonan, D. J.) is

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CITATION ABBREVIATIONS

"R"—Original Record herein.
"A"—Separate Appendix hereto.
"Pet. Ap."—Petitioner's Appendix in the Court of Appeals on file in this Court.
"Pet. Supp. Ap."—Petitioner's Supplemental appendix in Court of Appeals filed herewith.
"Find."—Findings below.

unreported and is printed in the separate appendix hereto *infra*, pp. A-1.

The decision of the United States Court of Appeals for the Second Circuit (Chase, Clark and Frank, C. JJ.) (R. 387, 388) summarily affirming the order of the District Court, *supra*, is unreported and is printed in the separate appendix hereto *infra*, page A-2.

The opinion of the Court of Appeals for the Second Circuit, on respondent's intermediate appeal and petitioner's cross-appeal thereon (Clark, Medina and Lumbard, C. JJ., opinion by Medina, C. J.), is reported at 227 F. 2d 509; 1956 A. M. C. 298.

The opinion of the Court of Appeals for the Second Circuit affirming, except as modified, the Decree of the District Court upon the merits (Hand, Hincks and Lumbard, C. JJ., opinion by Hincks, C. J.) is not yet reported and is printed in the separate appendix hereto *infra*, pages A-3-9.

Jurisdiction

The decisions and judgments of the Court of Appeals for the Second Circuit sought to be reviewed were entered on October 8, 1953 and January 8, 1958, respectively.

Jurisdiction of this Court is found in 28 U. S. Code Secs. 1254(1); 2101(c); and 2106.

Questions Presented

1. Where, by reason of the sudden descent of dense fog affording zero visibility, a ferry-boat and her passengers becomes entrapped in confined navigable waters surrounded by natural and man-made obstacles adjacent thereto and anchorage is impossible because of the lack of a holding bottom, as well as an insufficient swinging area, which would endanger the safety

of a ferry and her passengers, and her Master, by various maneuvers, endeavors to extricate her from her peril, does the mere fact that the ferry happened to be under some power at, or immediately prior to, the time of collision with one of the man-made, unmarked, obstacles constitute negligence per se?

2. Where a pier operator, with the consent and approval of the Secretary of War, maintains a trestle structure and pier extending, in length, over a mile from the New Jersey shore and well beyond the pierhead line, into the navigable waters of Upper New York Bay and, without command or requirement of said War Department, it recognizes the necessity of warning navigators in the waters adjacent to its structure during darkness, in clear weather, of the precise location of that portion of its structure which extends into, and adjoins, the navigable waters, and does so by means of maintaining red, navigational, warning lights thereon, does it have a corresponding duty of marking the same with audible signals during fog and poor visibility or, at least, responding to the fog signals of a vessel fogbound near said structure?

3. In a cause of maritime collision where the shipowner seeks the protection of the Limitation of Liability Act by filing an ad interim stipulation for its interest in the vessel with its petition and the sole damage claimant disputes the value of the vessel (and, consequently, the sufficiency of the ad interim stipulation), is the filing of the ad interim stipulation with its petition such an irrevocable election of a method of procedure which precludes the shipowner from surrendering its vessel and her freights to a Trustee, rather than litigate the issue of value?

4. Simply because the District Court is sitting in Admiralty, may it properly deprive a defendant, to an alleged claim, of a trial before the Court in open

Court on basic, material, though complex, issues involved in the litigation (other than accounting and similar matters) by compelling it to litigate those issues before a Special Commissioner appointed on an ad hoc basis and at the defendant's expense?

5. In a compulsory evaluation proceeding respecting an old vessel with a limited market therefor, may a special commissioner, appointed for evaluation purposes, disregard comparable sales of somewhat similar vessels, cost plus improvements less depreciation, and the uncontradicted and unimpeached testimony of a disinterested businessman in the trade in which the vessel had previously been engaged, and base his finding of value upon the unfounded opinions of "experts"?

Statutes Involved

The Shipowners Limitation of Liability Act, the Admiralty Rules of the Supreme Court, and F. R. C. P. 53(b), which are pertinent to the questions presented are set forth in the separate appendix hereto *infra*, pages (A-10-12).

Statement of the Case

The motorvessel "MAYFAIR" was a ferry owned by the petitioner, used occasionally to relieve its regular ferry, in the transportation of passengers between the Battery, in lower Manhattan, and the Liberty shrine on Bedloes Island.

At the time of the event, she was 75 years old, of composite, wood and steel, construction (R. 249), 145 feet in length, 25 feet in beam with a draft of approximately 9 feet, twin-screw, diesel-propelled, and duly certificated and licensed by the U. S. Coast Guard for the carriage of

passengers in the waters involved (Find. 1, Pet. Sup. Ap. 24a). She had been purchased from the U. S. Government by the petitioner back in 1947 for the sum of $15,000.00 and, capital improvements in her, between acquisition and the event, amounted to $500.00, making petitioner's total investment in said vessel in the sum of $15,500.00 as of January 15, 1953, the date of the event.

Respondent, Tankport Terminals, Inc., sole claimant, below, was the lessee in possession and operator of a trestle type dock, owned by the U. S. Government, which extended from the New Jersey shore, to the southeast, for a distance of slightly over one mile into upper New York Bay at a position of approximately 350 yards southwest of Bedloes Island. Approximately 750 feet of this structure, measured from its offshore head towards the New Jersey shore, extends into the Northwest channel that connects docks in Jersey City with the main ship channel of Upper New York Bay and, as such, forms a southwesterly perimeter of the Northwest channel (Finds. 2, 3, Pet. Sup. Ap. 25a). Approximately 435 feet northwest of, and directly opposite the perimeter section of this structure, the Bedloes Island channel intersects the Northwest channel which intersection is marked by two spar buoys, "S-5" and "S-4A", neither of which are equipped with any aids to navigation or other signaling device when poor visibility sets in (Finds. 4, 6, Pet. Sup. Ap. 25a, 26a). At the extreme offshore end of respondent's structure, it maintained two, red, navigational lights and, 750 feet inshore therefrom on the perimeter section, it maintained another red, navigational, warning light, all of which could be seen in clear weather from a 360 degree circle, subject to any intervening visual obstructions. There were no navigational warnings, either aural or visual, between these two points upon the structure and, shortly after 08:00 P. M. on the night of January 15, 1953, these red lights were not visible. The structure was equipped with floodlights but, at the time of the collision, these were unlighted (Find.

8, Pet. Sup. Ap. 26a). Respondent had a watchman whose duty it was to make periodic inspections of the perimeter section of its structure, punch a clock thereon, and flash his light over its sides to ascertain whether any damage had been inflicted to it since his previous inspection (R. 596, Bugdon). So frequently was respondent's structure damaged by other vessels in the area, that it was profitable enough for a dock repair company to maintain a floating rig in that area for the repair of such damages (R. 580-584, Franklin).

On January 15, 1953, the "MAYFAIR" became enveloped by dense fog as she prepared to leave Bedloes Island for the Battery on her usual 03:30 P. M. trip. She remained at her dock until about 08:00 P. M. when the wind shifted and the fog lifted sufficiently to permit visibility for a one-quarter mile range and the silhouette of the respondent's darkened dock against the background of the shore lights to the southwest of it (Find. 15, Pet. Sup. Ap. 28a). The Captain of the "MAYFAIR" immediately cast off for the Battery carrying the 61 stranded passengers, predominantly women and children, and had just commenced to gain headway, at a speed of about three knots, down the rockbound, 300 foot wide, Bedloes Island channel, when the fog suddenly again shut in and visibility was reduced to zero. Appropriate lookouts were posted and the "MAYFAIR's" whistle was sounded at one minute intervals in conformance with proper procedure (Find. 17, Pet. Sup. Ap. 28a).

Some ten to fifteen minutes later, the "MAYFAIR" was in collision with the perimeter section of respondent's structure that extended into the Northwest Channel at a point forming the midline of the usable portion of the Bedloes Island channel and said structure. It was found, and conceded, that the red, navigational, warning lights on the structure were not visible through the fog, nor were its floodlights turned on, or any audible signals rendered by the respondent in response to the "MAY-

FAIR'," fog-signals. Collision with the respondent's structure occurred at about 08:15 P. M. (Find. 18, Pet. Sup. Ap. 29a) at which time respondent's watchman, Bugdon, was enclosed in its main office ashore, about a mile away from the point of collision, having lunch with his dog (R. 592, 593, Bugdon).

Upon colliding with respondent's structure, the "MAYFAIR's" Master placed her engines on slow ahead to hold her into respondent's dock pending an examination for puncture of the "MAYFAIR" and possible landing of his passengers thereon for safety. The ancient "MAYFAIR" sustained no damage and none of its passengers were injured (Find. 18, Pet. Sup. Ap. 29a) but this maneuver did further damage to respondent's structure. The Master immediately dispatched crewmen to the structure who, in turn, found the block valves of the oil lines thereon, 300 feet inshore from the point of collision, open causing the discharge of oil products into the Bay through some lines severed by the collision. They immediately shut down these valves, stopping the oil flow and resulting hazard, and then searched out respondent's watchman ashore and advised him of the occurrence.

On March 31, 1953, petitioner filed a petition for exoneration from, or limitation of, liability accompanied by two marine surveyors' affidavits of value and an ad interim stipulation for petitioner's interest in the "MAYFAIR" in the sum of $15,000.00, and her pending freight in the sum of $56.25, with the usual cost bond, and the usual restraining order was issued by the District Court.

Respondent, sole claimant below, filed its answer and claim for damages to its structure as well as an exception disputing the "MAYFAIR's" value and the District Court ordered a reference to a special commissioner appointed, *ad hoc*.

Petitioner objected to proceeding before the special commissioner and moved the District Court for leave to amend its petition and surrender the "MAYFAIR" to a

trustee to be appointed by the Court, rather than proceed before the commissioner (R. 351-355), which was denied (Opinion Order, R. 371-372; A-1).

Petitioner appealed to the Court of Appeals for the Second Circuit (R. 379) from the Order aforesaid, and the Court of Appeals, on motion by the respondent, summarily affirmed the District Court upon the authority of its *Ontario* case, 80 F. 2d 85 (R. 387, 388; A-2; otherwise, unreported).

Petitioner then moved the District Court to vacate its order of reference to the special commissioner and recall the matter of evaluation of the "MAYFAIR" to be heard by itself in open Court (R. 389-394), which was scathingly denied (R. 389-394; 404-417; Pet. Ap. 9a).

On March 31, 1954, the special commissioner filed his report finding a value for the "MAYFAIR" in the sum of $30,000.00 (R. 446-458; Pet. Ap. 12a). Exceptions thereto (R. 462-465) were overruled (R. 476-478) and the petitioner directed to pay the special commissioner a fee of $600.00.

Respondent then moved the District Court for an Order directing the petitioner to post additional funds or stipulation in the amount of $15,000.00, to meet with the special commissioner's finding of value and, in the event of default thereto, to grant it an interlocutory decree with a reference to another special commissioner for ascertainment of its damages. On September 16, 1954, the District Court (Bicks, D. J.) entered its order directing petitioner to post an additional $15,000.00 within fifteen days (R. 496, 499) but declined to rule upon the application for the interlocutory decree and reference in event of petitioner's default upon the ground that it was premature.

On October 27, 1954, respondent moved the District Court for an Order granting it an interlocutory decree with a reference to a special commissioner for ascertainment of its damages upon the ground of petitioner's failure to comply with the order directing it to post additional secu-

rity, as aforesaid. The District Court (Ryan, D. J.) denied the respondent's motion for an interlocutory decree and reference holding that the petitioner's default, upon this record, was not such a wilful default as to entitle the respondent to an interlocutory decree, but that petitioner would not be deprived of its right to dispute liability and damage (R. 500-510) though, since it was in default, its prayer for limitation of liability must be denied.

Respondent moved for rehearing, which was denied (R. 516-520) and then appealed to the Court of Appeals for the Second Circuit (R. 525).

On respondent's appeal aforesaid, petitioner cross-appealed to protect its objections and exceptions below (R. 526) respecting the compulsory reference to a special commissioner for appraisal of value of the "MAYFAIR", the order directing petitioner to pay the fee of the special commissioner on the compulsory reference, and its exceptions to the commissioner's report.

The Court of Appeals dismissed the respondent's appeal and petitioner's cross-appeal, as premature, 227 F. 2d 509.

Respondent moved the Court of Appeals for rehearing, and then mandamus, each of which was denied. It then petitioned this Court for certiorari, and in the alternative, mandamus, which was denied.

The cause finally came to trial upon the merits before Palmieri, D. J., who flatly refused to permit any testimony or evidence concerning the actual damage sustained by respondent's structure (R. 591), confining the trial solely to the issue of liability, and holding, over the objections of petitioner, that the issues respecting damages were for a special commissioner.

The District Court held the petitioner solely liable for such damage as respondent's structure may have sustained upon the ground that, at the moment of impact or immedi-

ately before, the vessel was under power. The Court of Appeals (A-7) affirmed the District Court holding that the fact that the "MAYFAIR" was under some power at the time of impact she

"was at fault on that account"

and that a conclusion of negligence therefor, "was right", citing its *Pennsylvania R. Co.* v. *Central R.R. of New Jersey*, 103 F. 2d 428, cert. den'd 308 U. S. 591, case, (A-7).

In affirming the District Court's holding of the Petitioner solely liable for the collision, the Court of Appeals further held that the respondent was under no duty to respond to the "MAYFAIR'S" fog signals, either audibly or visually, "because it knew of no rule of law imposing such a duty" (A-8).

The Court of Appeals, in affirming the District Court's denial to the Petitioner of the right to limit its liability, held that it did so because the Petitioner had failed to abide by an admiralty method of procedure which it had chosen—the *ad interim* stipulation for value method. This method the District Court held to be an irrevocable election, once taken, (A-1) that precluded the Petitioner from surrendering its vessel to a Trustee and thereby obliging it to submit to a compulsory evaluation proceeding before a Special Commissioner appointed for that purpose. The Court of Appeals had summarily affirmed this doctrine of "irrevocable election" (A-2) on the basis of its *Ontario* decision (1936), 80 F. 2d 85.

Likewise, the Court of Appeals affirmed the District Court's refusal to hear evidence upon the issue of damages and the reference of that issue to a Special Commissioner upon the ground that, though that issue does not appear to be "overly complex," the reference is, nevertheless, proper because the Supreme Court Admiralty Rules contain no counterpart of F. R. C. P. 53(b) (A-8).

In affirming the $30,000.00 valuation, as found by the Special Commissioner upon the compulsory evaluation ref-

erence, the Court of Appeals approved of the yardstick used by the Commissioner and the legal sufficiency of the evidence in support of that yardstick (A-6).

(The separately bound exhibits, submitted with the original record herewith, graphically and pictorially, depict the locale of the event.)

Reasons for Allowance of the Writ

The decision of the Court of Appeals for the Second Circuit is a novel one involving substantial questions concerning the interpretation and administration of the Shipowners' Limited Liability Act in conjunction with the procedural Admiralty Rules of this Court respecting the same; the jurisdiction and judicial powers of a District Court, sitting in Admiralty, in the administration of justice; an unprecedented rule of navigation and liability; and, a novel yardstick of evaluation under the Limitation of Liability Act, all of which are of the utmost concern and importance to shipowners, operators, underwriters and skilled navigators throughout the world using our ports and harbors in the course of foreign and domestic commerce.

Further, the decision of the Second Circuit, appears to be in direct conflict with decisions of this Court, as well as other Circuits, as is hereafter shown and is one which, by the language of the authority relied upon in reaching the decision—its *Pennsylvania* case, *supra*—begs for review and settlement by this honorable Court.

Questions 1 and 2—Collision Liability

Upon the issue of collision liability, the decision of the Court of Appeals for the Second Circuit conflicts with the decisions of this Court in *Atlee* v. *N. W. Union Packet*, 21 Wall. 389; *Casement* v. *Brown*, 148 U. S. 615; *The Morning Light*, 2 Wall. 550; decisions of the Seventh Circuit, precisely in point under similar circumstances and facts, namely: *Erie & Western Transportation Co.* v. *City of*

Chicago, 178 Fed. 42, cert. den'd 216 U. S. 620 and *City of Chicago* v. *Goodrich Transit Co.*, 199 Fed. 112, which cite and rely upon this Court's decision in *Casement* v. *Brown, supra;* and, decisions in the Sixth and Third Circuits.

The Second Circuit decision holds that, regardless of the nature of the waters and environment in which the vessel chances to be at the time, when she suddenly becomes enveloped by fog affording zero visibility, any movement of that vessel thereafter is negligence, *per se,* if a collision with an unmarked object, resulting in damage to that object, follows. As authority for this novel doctrine, the Second Circuit cites its opinion in its *Pennsylvania* case (*Pennsylvania R. Co.* v. *Central R. R. of New Jersey,* 103 F. 2d 428; 1939 A. M. C. 583; cert. den'd 308 U. S. 591), a situation having no similarity whatsoever with the situation in the case at Bar.

In the case at Bar, the 147 foot "MAYFAIR" had left her dock at Bedloes Island, with a quarter mile range of visibility, and the silhouette of the respondent's darkened dock, 1,000 feet ahead of her, was visible against the background of the New Jersey shore lights. She had proceeded a few hundred feet down the 300 foot wide Bedloes Island channel toward respondent's unmarked structure and was just gaining momentum at a speed of about 3 knots when fog, affording zero visibility, suddenly enveloped her. With rocks to both sides of her, the dock she had just left somewheres behind her, and respondent's unmarked structure some several hundred feet ahead of her, the rocky bottom affording no anchorage ground and the narrow width of the channel affording no scope within which to swing if the bottom had afforded a holding ground, any maneuver, or failure to maneuver, was fraught with danger to herself and passengers.

On the other hand, in the *Pennsylvania* case, the ferry "RED BANK" had left its slip in New Jersey in fog, affording a 35-foot range of visibility, and was seeking its slip in Manhattan while, admittedly, proceeding at a speed that

would not permit her to stop the way of the vessel within that 35-foot range. In the course of seeking her Manhattan slip, she struck a barge moored at the pierhead in the vicinity, and within the pierhead line, with such force as to sink her right there. The barge had lights upon it and the bargee heard the ferry's fog signals, but did not respond with any audible means. The Trial Court, quite logically, held both to blame—the ferry for proceeding at an excessive rate of speed and the barge for failing to sound an audible signal in response to the ferry's, 25 F. Supp. 846, 1938 A. M. C. 1044.

On appeal, the Second Circuit, modified the decree below to sole fault on the part of the ferry holding that, even though moored to a pierhead. a single vessel has no duty to disclose her location by audible means to a vessel nearby that is sounding fog signals, saying of this self-adopted doctrine:

> "We are confident that we ought not to intervene, and *until some competent authority does so, we shall leave the rule as it stands.* After all, it is not a bad pie-powder compromise; so far as it goes, there is something to be said for it; *nobody competent to pass upon it has said that it should extend further.* We hold, therefore, that a single vessel moored to a pierhead need not sound warnings." 1939 A. M. C. 583, 585. (Emphasis supplied.)

In the case at Bar, we are not dealing with a structure within the pierhead line or a vessel moored to the head of such a structure, but are dealing with a structure extending well beyond the New Jersey pierhead line for over a mile in length into the navigable waters of Upper New York Bay and the Northwest channel thereof in such fashion as to form a perimeter barrier in the southerly side of the Northwest channel. See, i.e., *Atlee* v. *N. W. Union Packet*, 21 Wall. 389.

In the *Pennsylvania* case, the ferry had the whole reach of the deep Hudson River behind her and the only possible obstacles were ahead of her. She admittedly was proceeding at a speed in excess of that required to stop within the 35-foot range of visibility. In the case at Bar, the "MAYFAIR" had been maneuvering in the confined waters, entrapped as she was, for some ten to 15 minutes dispelling any notion whatsoever of speed. Immediately before, or at the time of impact with the respondent's dock, her engines were found to be on slow ahead. Because she was under some power, at the time of impact, under the circumstances surrounding her the Court of Appeals holds that a conclusion of negligence, *per se*, is proper.

In the *Solomon's Island Ferry* case, 1937 A. M. C. 675, 679, the Court of Appeals for the State of Maryland, following the prevailing decisional rulings on this point, aptly states the law, viz.:

> "Considering the frequency with which fogs occur in certain areas, and the serious interruption of water transportation which would result, if persons charged with the operations of a ferry were required to suspend operations whenever a fog occurred, *the mere act of continuing to operate the ferry under fog conditions should not be characterized as negligence per se*, if it were operated prudently, cautiously and carefully, with due regard to the safety of the passengers, and so as *to avoid as far as possible injury or damage to* the person or *the property of others.*" (Emphasis supplied.)

And, in *Hoffman, et al.* v. *Union Ferry Co.*, 68 N. Y. 385, the New York State Court of Appeals, in considering the duty of a ferry pilot of proceeding or laying to in a fog, said:

> "The running of a ferryboat upon her regular trips is important to the public, and her efforts to serve

the public should be regarded with favor. Negligence would *not readily, or except upon a clear showing,* be imputed to her in endeavoring to make her trips in the dark or through fog, * * *." (Emphasis supplied.)

See also: *The Orange,* 46 Fed. 408.

In this respect, the decision of the Second Circuit imposes upon skilled navigators, contrary to natural intuition and seamanship, a horrifying rule of navigation when, by Acts of God, their vessels suddenly become imperiled in dangerous waters. Under the Second Circuit's decision, the Master must stop his vessel and let her lay to, trusting to fate and disregarding the effects of winds and currents upon her precarious position and safety. Any maneuver of her engines in an effort to extricate her from the dangers surrounding her is, *per se,* negligence. Research fails to reveal any such rule and, to layman or seaman, such a rule is contrary to common sense and the natural instinct to extricate from peril.

But the Second Circuit's decision goes radically further and exonerates the respondent from any liability whatsoever, holding the petitioner solely liable upon the purported analogy of its *Pennsylvania* case. It holds that *even* though the respondent recognized the necessity of marking its man-made structure with red—the traditional color of danger—navigational warning lights to aid navigators to avoid its structure during darkness in *clear* weather, it had no duty of returning audible, or other, signals to the "MAYFAIR's" in the dense fog, even though it had a watchman assigned to patrol the structure, and to make periodic examinations of the same for collision damages by craft using the channel.

This ruling appears to conflict with the holding of this Court in the leading case, *Casement* v. *Brown, supra,* which holds that it is the duty of proprietors of such structures

"*to give all needful warning* to persons and boats." 148 U. S. 615, 625. (Emphasis supplied.)

The Seventh Circuit, following *Casement* v. *Brown* as authority, in *Erie* v. *Western Transp. Co.* v. *City of Chicago, supra,* a case remarkably similar, stated:

> "The crib was a structure so placed for the purposes of the City, and with its creation the obligation was assumed to provide such means of warning as were well known requirements for the protection of navigators when darkness, fog, or thick weather, prevented reasonable observation of the structure from an approaching vessel; and this with or without specific directions in the permit or elsewhere. While a light was *needful* (and so recognized by the City) to mark the location at night, it is established, both by testimony in this record and by precedents, that lights are ineffectual for fog signals, and *that bells or other sounding means are imperative* and customary requirements for fog and thick weather signals.
>
> We are satisfied, therefor, that placing and maintaining the crib as located involves an obligation to provide thereon and give suitable fog signals *when needful for safe navigation;* that the collision in controversy arose through non-performance of that duty; and that the party responsible for the failure is answerable for the resulting damages.' (Emphasis supplied.)

And, following its *Erie & Western Transp.* decision, the Seventh Circuit, again following the holding in *Casement* v. *Brown*, stated in *City of Chicago* v. *Goodrich Transit Co., supra:*

> "The City having placed at the mouth of the harbor an obstruction to navigation, the legal obligation rested upon it to provide on the crib and to keep in use suitable fog signals. This record clearly shows that a light alone is not an efficient fog signal for safe navigation. *An audible signal was necessary under the law.*" (Emphasis supplied.)

Indeed, as this record clearly shows, had the Master of the "MAYFAIR" any warning whatsoever from the respondent's structure, even at a twenty-five foot distance from it, he could have avoided collision with it. And, as the undisputed testimony shows, had the respondent's watchman as much as turned on the structure's floodlights, in response to the "MAYFAIR'S" fog signals, the loom of those lights would have apprised the Master of the proximity of the vessel to the structure, so that he could have taken appropriate avoiding action. But, the Court of Appeals ignores that fact because, in its language, "it knows of no rule of law" placing the respondent under such a duty.

In the *Erie & Western Transp.* case, *supra,* like the respondent in the case at Bar, the City contended that unless specifically directed to do so by its permit, statute, or regulation *it* had no duty to mark its structure. Replying to that contention, the Seventh Circuit, quite logically, stated:

> "Whatever may be the force of statute or permit by way of authority to maintain the crib, this contention is without sanction, as we believe, in any reasonable view, either of the provisions referred to, or of the well recognized paramount rights of commerce to use navigable waterways and *have all needful warnings to guard against obstructions* placed therein." (Emphasis supplied.)

As members of this Court have often stated, the denial of a petition for certiorari does not necessarily mean that this Court approves of the decision sought to be reviewed. An examination of the petition, seeking certiorari in the Second Circuit's *Pennsylvania* case, which was denied, reveals that the petitioner, there, failed to show the mportance of the question, conflicts in decisions, or any of the reasons generally considered by this Court for the grant of the writ.

Question No. 3—Limitation of Shipowner's Liability—Substance v. *Procedure*

The Court of Appeals for the Second Circuit holds that where a shipowner initiates a proceeding for limitation of its liabilty under the Act 46 U. S. C. A. 183 (a), 185 and Gen. Adm. Rules 51 and 52 by filng an ad interim stipulation for value, with its petition for limitation, it thereby makes an irrevocable election of a method of proceeding thereafter.

The decision of the Second Circuit, places procedure above substance. Its decision is in direct conflict with that of *Ohio Transp. Co. et al.* v. *Davidson S. S. Co.*, 148 Fed. 185, cert. den'd, 203 U. S. 593, also a Seventh Circuit decision, and this Court's admonition contained in the *Scotland*, 105 U. S. 24, respecting the administration of General Admiralty Rules 51-54. The District Court and the Second Circuit both relied upon the doctrine enunciated by the Second Circuit in the *Ontario* No. 1, 80 F. 2d 85. In the *Ontario*, in contrast to the case at Bar, the petitioner deliberately underwent a valuation proceeding and then sought to surrender its vessel, in lieu of posting a bond, so that it, through a dummy, might buy its vessel back for a nominal figure at a Marshal's sale. In the case at Bar, when the respondent moved the issue of valuation on for hearing to ascertain, the petitioner moved for leave to amend its petition so as to surrender its vessel to a Trustee to be appointed by the Court because the best evidence of value of the "MAYFAIR" was the vessel itself, which was free and clear, rather than the speculations indulged in as so many of the cases on evaluation reveal. In the Second Circuit's *Ontario* case, relied on in the District Court and the Second Circuit, no authorities are cited and, for aught that appears, when it rendered the *Ontario* decision, it may very well have been unaware of the Seventh Circuit's *Ohio Transp.* decision, *supra*. In the *Ohio Transp.* case, the petitioner underwent an evaluation proceeding and, upon its conclusion, was dissatisfied with the valae found and peti-

tioned for leave to surrender its vessel, by amending its petition for limitation, rather than pay into Court the value found. The petition was granted and petitioner was permitted to surrender its vessel instead.

In the case at Bar, the petition for leave to amend and to surrender was promptly made and denied, whereby petitioner was compelled to undergo a valuation proceeding at great expense to it and over its protests.

As will be illustrated, the decision holding petitioner to an "irrevocable election" of a *manner* of proceeding in a limitation of liability proceeding, is inconsistent wth the due administration of justice. Thus, a vessel could be proceeding down New York harbor bound for a foreign port and be in collision with another vessel. Because her own physical damage is such as to permit her to safely continue with her voyage, she does so and, while upon the high seas, the other vessel asserts a claim for damages far in excess of the value of the first vessel. The first vessel's owner, seeking the protection of the Limitation of Liability Act, has no recourse other than to proceed by the ad interim stipulation for value method, which it does. Thereafter, the second vessel elects to challenge to value asserted by the petitioner for the first vessel and, rather than undergo the expensive, speculative, results of an evaluation proceeding, the petitioner seeks leave to surrender its vessel upon her return to New York, accounting for depreciation, etc., in a condition equivalent to that at the time of collision. Under the Second Circuit's decision, this is not possible and the first shipowner is bound to undergo a compulsory evaluation proceeding and its speculative result. As in the case at Bar, if the value found be in excess of what can be raised upon the vessel, the shipowner, in order to comply with the Court's order for payment into Court of the value found, would be obliged to dispose of other assets, in addition to the vessel, in order to comply. In the case at Bar, compliance with the order, based upon the value of $30,000.00 found upon the compulsory reference, meant that

the petitioner was obilged to dispose of other assets, to the harm of other creditors, or liquidate its business. Such, however, is not the spirit of the Act as declared by Congress. The Act was enacted to encourage investment in, and development of, an American merchant marine. The question, therefore, is of tremendous import to all connected with the shipping industry whether they be owners, operators, charterers or underwriters. Contrary to this Court's language in the *Scotland, supra,* the decision places procedure above substance, which is fundamentally clearly erroneous.

Question No. 4—Compulsory References in Admiralty

The Second Circuit holds that because the Supreme Court admiralty rules contain no counterpart of F. R. C. P. Rule 53(b) it is perfectly proper for a District Court, sitting in admiralty, to refer issues, other than accounting matters, to Special Commissioners, thereby ruling that this Court's decision in *La Buy* v. *Howes Leather Co.*, 1 L. Ed. 2d 290 (1957); *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701; *McCullough* v. *Cosgrove*, 309 U. S. 634, are inapposite.

Indeed, in the District Court when petitioner sought an order staying the Special Commissioner from proceeding pending decision upon petitioner's application for leave to amend its petition and surrender its vessel, the stay was denied, the Judge (Dimick, D. J.) therein holding as the ground for the denial,

> "that it was not g od judicial administration to interfere with the commissioner."

A motion in the District Court to recall the reference to evaluate and to have the compulsory evaluation heard and determined in open Court was scathingly denied by the Judge (Clancy, D. J.) who had appointed the Special Commissioner, with ominous threats of "contempt" because petitioner had sought relief therefrom.

In short, and as stated not only by this Court in the *La Buy* case but by Chief Judge Clark, of the Second Circuit, in a dissenting opinion in the *Dona Aurora*, 206 F. 2d. 651, 656, 657, compulsory references are an abuse of a Court's powers and amount

> "to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

In the case at bar, petitioner has been put to an inordinate expense upon the compulsory evaluation reference for an unwarranted extended record, not made by an official court reporter at rates set by the Court, but by a private stenographer appointed by the Special Commissioner at rates in excess of those of the Southern District court reporters. Petitioner has also been directed to pay the Special Commissioner a fee of $600.00 on this compulsory reference. Petitioner, like the many other millions of our citizens, is a taxpayer and is entitled to have its day in open court upon basic issues involved in the litigation, other than plain accounting items. Compulsory references, in other than simple accounting, constitute a delegation of the judicial function, without sanction of the Congress or the Supreme Court, to a temporary substitute appointed on an *ad hoc* basis, inexperienced not only in the judicial work, but in maritime matters as well. From the tax fund, the Congress allocates funds for the operation of the Federal judiciary system and petitioner is entitled, of right, to the judicial function in open Court and not, by compulsion and at its expense, before an unknown and questionable substitute. Further, the compulsory references herein are, as this record shows, plainly arbitrary. To sanction and approve compulsory references by District Judges, simply because they are sitting as admiralty judges instead of common-law judges without a jury, is to impose a different quality of justice administered by an admiralty court, to that of the common-law courts; something that is contrary to the oft-waved banner of

"equality under the law" and "equal application of the law." Nor, under General Admiralty Rule 43, does either, the District Court or the Circuit Court, attempt to show that the compulsory references, as to value and damages, are "expedient or necessary for the purposes of justice." See, *U. S. A.* v. *Kirkpatrick*, 186 F. 2d 393 (3rd C. of A.). Likewise, the compulsory reference of the issue of damages in the case at bar is not a mere tabulation such as would result had a joint survey prior to litigation been had. There are issues respecting damages concerning fraudulent padding of the same, attempts by the respondent to charge the petitioner, under the guise of damages, with capital improvements upon its structure made by respondent following the collision. These are not questions for an *ad hoc* appointee, but are questions requiring the judicial function of an experienced judge in open Court.

It is submitted, therefor, that references, whether at law or in admiralty, should be the exception and not the rule, F. R. C. P. 53(b), and should be made only where expedient or necessary for the purpose of justice, General Admiralty Rule 43, because references are productive of unnecessary expense and a burden to litigants by reason of extended records and hearings, *Los Angeles Brush Co., supra*, and are frowned upon by the Courts as not matters of right belonging to any litigant, *Bushey* v. *Hedges* (C. of A., 2d), 167 F. 2d 9, 17; and, in admiralty, as well as at common law, a litigant is entitled to the trial of all of the issues, except simple accounting matters, in open court, General Admiralty Rule 46, for the purposes of justice, *U. S. A.* v. *Kirkpatrick, supra; Adventures in Good Eating* v. *Best Places to Eat*, 131 F. 2d 809, and the delegation of a court's judicial function and refusal to hear the issues in open court is a denial of the judicial process, *La Buy* v. *Howes Leather Co., supra; The Dona Aurora, supra* (Judge Clark's dissenting opinion in the Second Circuit). The delegation of the judicial function to a special commissioner upon the compulsory eval-

uation, and the refusal to recall that reference, as well as the compulsory reference now pending for the ascertainment of the respondent's damages, all of which have been affirmed by the Second Circuit on the theory that the Admiralty rules contain no counterpart of F. R. C. P. 53(b), were an abuse of the district court's powers and constitute a denial of the judicial process to the petitioner. Under the American system of justice, there cannot be one quality of justice simply because a Judge chances to be sitting in admiralty, and another because he chances to be sitting at common law. Nor has the Congress ever authorized the District Judges, at the expense of a litigant, to delegate their appointed functions as Judges to individuals appointed by themselves for that purpose.

Question No. 5—The Yardstick of Evaluation of the "MAYFAIR"

In affirming the yardstick used by the special commissioner to reach his evaluation result, the Second Circuit has applied a yardstick of sheer doubt and speculation. The special commissioner found a value for the "MAYFAIR" at $30,000.00 based upon the opinions of "experts", and disregarded the evidence with respect to: (1) acquisition cost, plus improvements, less depreciation, (2) comparable sales of other vessels and (3) the fact, that while the hearings were being held before him, petitioner had lost the franchise for operation and the vessel was actually laid up and still was so when the case was before the Court of Appeals, and continues to be so to this day.

In 1947, six years prior to the collision, petitioner had acquired the "MAYFAIR" from the U. S. Maritime Commission for the sum of $15,000.00 and had made capital improvements in her in the sum of $500.00. The special commissioner held that her cost, plus improvements, less depreciation, could not be considered because it was "inconclusive."

Despite the fact that several other vessels of similar type, and some more modern in structure, were sold about

the time that the hearings were being held, the commissioner held that consideration of these other sales in order to reach an evaluation of the "MAYFAIR" could not be used because it was "impractical".

Consequently, the special commissioner relied upon the testimony of "experts" which he found to be "impressive". The Court of Appeals, affirmed this phase of the appeal contending that there was conflicting evidence before the special commissioner and therefore there was nothing to warrant reversal of his finding.

The only conflicting evidence before the special commissioner is the incompetent hearsay of the respondent's "experts" in contrast to actual proved facts uncontradicted, otherwise, upon this record. The testimony of respondent's "experts", which the special commissioner found to be "impressive", reveals that one was "a graduate of the School of Hard Knocks and the University of Bay Rum" (R. 244), and the other, who like the first, knew nothing about the condition of the "MAYFAIR's" bottom or engines (R. 216), knew of no comparable sales or potential purchasers or users for the "MAYFAIR" (R. 220), made no investigation to determine demand for a craft such as the "MAYFAIR" (R. 217), and whose testimony, as admitted by him, was based upon pure hearsay—what respondent's counsel had told him.

On the other hand, petitioner's expert, who had appraised the "MAYFAIR" for the valuation placed by petitioner in its ad interim stipulation of $15,000,00, based his value upon her acquisition cost plus improvements and less depreciation, quite properly stating with respect to value,

> "You just can't pick something out of the air" (R. 283).

The comparable sales of about six other vessels, which the special commissioner chose to ignore as "impractical" if properly considered and prorated to the "MAYFAIR's"

age, show an average market value of $9,500.00—a figure which also coincides with the "MAYFAIR'S" cost, plus improvements, less depreciation.

The successor to the petitioner in the franchise operation who outbid it for the franchise, though purchasing another vessel previously used on that operation, testified that because of the "MAYFAIR'S" age—75 years—it would only be willing to pay from $6,000.00-$8,000.00 to petitioner for her—vital, unimpeached, and uncontradicted, testimony by the one, if any, who could have made use of her, but ignored by the special commissioner in favor of the unfounded "expert" opinions.

This yardstick, it is submitted, conflicts with this Court's decision in *U. S.* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396. See, also: *Cors* v. *U. S.*, 75 F. Supp. 235, remanded for further proceedings, 337 U. S. 325 and, upon remand, 96 F. Supp. 460.

As this Court has said in the *Toronto, Hamilton & Buffalo Nav. Co.*, case, *supra:*

> "We have said that the absence of 'market price' does not, ipso facto, rid isolated contemporaneous sales of all relevance."

In the case at Bar, there is no question that the market for vessels of the "MAYFAIR" type necessarily was, and is, a very limited one but, because of this unique situation, it is no reason to disregard comparable prices on such a limited market. And, as this Court has said,

> "the question is what the ordinary businessman in the trade would do."

Here, the ordinary businessman in the trade—the successful outbidder to the petitioner—affirmatively asserted what it would do by offering not in excess of $8,000.00 for the "MAYFAIR". No other possibilities, with the slightest foundation whatsoever, could be established by the re-

spondent. And, as stated by Chief Judge Clark in his dissenting opinion in the *Dona Aurora*, citing this Court's opinion in the *Toronto, Hamilton & Buffalo Nav. Co.*, case, *supra*, in support thereof:

> "As these figures themselves demonstrate, the process was that these high values of the experts were accepted as basic"

and then, as in the case at Bar, the unfounded expert opinion value was subjected to alleged comparisons with the factors ignored by the special commissioner in his effort to have the result seem more palatable.

And so, when an ancient vessel costing $15,500.00 in 1947, is valued at $30,000.00 seven years later—an increase making the total approximately 200% of the original, or more if depreciation is considered—and this in a declining market, where the vessel has lost her employment and is idled, the result is sufficiently surprising and incongruous as to indicate that error has occurred. The initial and conditioning error, of course is, as has been argued *supra*, the compulsory reference to a special commissioner where the rules accepted for himself absolutely conditioned the result. Of these rules, the basic one which led to the overall so-generous result was, as the record clearly demonstrates, the acceptance of an opinion valuation figure, without any competent foundation, made by "experts" and the commissioner's refusal to consider the competent facts established upon this record and accord to them the weight to which they are entitled at law.

CONCLUSION

For all of the above reasons, a writ of certiorari, as prayed for, should be granted.

HARRY D. GRAHAM,
Counsel for Petitioner,
76 Beaver Street,
New York 5, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

In the Matter of the Petition
of
WILLS LINES, INC.,
for exemption from, or limitation of, liability,
Petitioner,

TANKPORT TERMINALS, INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY D. GRAHAM,
Counsel for Petitioner,
76 Beaver Street,
New York 5, N. Y.

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Opinion/Order of District Court, Denying Leave to Surrender Vessel to Trustee.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Admiralty A 177-223

In the Matter of the Petition

of

WILLS LINES, INC.

for exoneration of, or limitation of, liability.

NOONAN, D. J.:

This is a motion for leave to amend the petition in this proceeding, and for an order appointing a Trustee to take title to the motor-vessel involved pending the ultimate determination of this proceeding, in lieu of an ad interim stipulation now on file, and permitting the petitioner to withdraw that stipulation.

In short, what the petitioner is seeking is leave to substitute surrender of the vessel and her freight for the ad interim stipulation previously filed. The question presented is whether by filing the order for the ad interim stipulation and the stipulation for value the petitioner has irrevocably elected this form of limitation of liability.

The claimant relies on the doctrine of the case of the *Ontario No. 1*, 80 F. 2d 85, as authority for precluding the substitution. We agree.

The order for monition, the monition and a restraining order have already been procured by the petitioner. It has reaped all the benefits of this form of relief and must abide by its election.

The motion is accordingly denied. So ordered.

Dated: New York, N. Y., September 29, 1953.

/s/ GREGORY F. NOONAN,
U. S. D. J.

Order, Summarily Affirming the Opinion.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
ALEXANDER M. BELL, Clerk — Foley Square, New York 7

"STAY DENIED H. B. C. C. E. C. J. N. F. U. S. C. JJ." October 8, 1953

On motion for order summarily affirming—"order affirmed on authority of the Ontario 2nd Cir. 80 F (2nd) 85

HBC
CEC
JNF C. JJ."

Order, Denying Motion to Recall Reference.

Petitioner, having moved by order to show cause signed by Honorable Henry W. Goddard dated November 4, 1953, for an order to vacate the order of appraisal herein and to have the matter referred returned to this Court for hearing and adjudication by this Court, and said motion having come on to be heard on the 5th day of November, 1953, before Honorable Henry W. Goddard, and said motion having been respectfully referred to Judge Clancy,

Now, upon reading and filing the order to show cause signed by Honorable Henry W. Goddard, U. S. D. J., on November 4, 1953, and the affidavit of Harry D. Graham sworn to November 3, 1953, and Harry D. Graham, proctor for petitioner, having appeared in support of said motion, and Krisel, Beck & Taylor, by Max Taylor, proctors for claimant, Tankport Terminals, Inc., having appeared in opposition thereto, and the Court after due deliberation thereon having denied said motion and vacated the stay contained in said order to show cause,

Now, upon motion of Krisel, Beck & Taylor, proctors for claimant, Tankport Terminals, Inc., it is

ORDERED, that said motion be and the same is hereby denied, and it is further

ORDERED, that the stay contained in the show cause order signed by Honorable Henry W. Goddard, U. S. D. J., on November 4, 1953, be and the same is hereby vacated.

Dated: New York, N. Y., November 16, 1953.

JOHN W. CLANCY,
U. S. D. J.

Filed November 16, 1953.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 101—October Term, 1957.

(Argued November 21, 1957 Decided January 8, 1958.)

Docket No. 24745

In the Matter of the Petition

—of—

WILLS LINES, INC.,

for exemption from, or limitation of, liability,

Petitioner-Appellant-Cross-Appellee,

TANKPORT TERMINALS, INC.,

Claimant-Appellee-Cross-Appellant.

Before:

HAND, HINCKS and LUMBARD,

Circuit Judges.

Appeal from an interlocutory decree in a limitation proceeding in admiralty, entered in the United States District Court for the Southern District of New York, Edward L. Palmieri, *Judge*, which also presents for review cross-appeals from an interlocutory order entered by Judge Ryan in 1955. See 227 F. 2d 509. Affirmed except as modified.

HARRY D. GRAHAM, New York, N. Y., *for petitioner-appellant-cross-appellee.*

MAX TAYLOR, New York, N. Y. (Krisel, Beck & Taylor, New York, N. Y., on the brief), *for claimant-appellee-cross-appellant.*

HINCKS, *Circuit Judge*:

This case presents for our consideration cross-appeals from an interlocutory order in admiralty entered in 1955 by Judge Ryan as well as an appeal by petitioner, Wills Lines, Inc., from an interlocutory decree on the merits entered by Judge Palmieri. This litigation has arisen out of limitation of liability proceedings commenced by the petitioner.

The claimant, Tankport Terminals, Inc., appeals from so much of Judge Ryan's order as denied it a decree *pro confesso*. Petitioner appeals from so much of Judge Ryan's order as refused petitioner a limitation of liability. Petitioner also appeals from the decree of Judge Palmieri which (1) found petitioner solely liable for the damage suffered by claimant; (2) ordered a reference to ascertain claimant's damages; (3) awarded claimant interest for the period of approximately two years, throughout which an appeal from Judge Ryan's order, which had been instituted by the claimant, had been pending. See *In re Wills Lines*, 2 Cir., 227 F. 2d 509, cert. den. and leave to file petition for mandamus denied on April 30, 1956, 351 U. S. 917.

The S.S. Mayfair was a ferry owned by petitioner and used to transport sight-seers between the Battery and the Statue of Liberty on Bedloe's Island. On January 15, 1953, the Mayfair was enveloped by fog as it prepared to leave Bedloe's Island on its normal 3:30 p. m. trip. The fog remained dense until shortly before 8:00 p. m., when the wind

shifted and visibility increased. The captain of the Mayfair immediately set out for the Battery, carrying 61 passengers who had been stranded on the Island. The ship had just commenced to gain headway and was 150 feet from its starting point when the fog suddenly again shut in and visibility was reduced to zero. Lookouts were posted and the Mayfair's fog whistle was sounded at one minute intervals in conformance with proper procedure.

Approximately ten minutes later the Mayfair collided with the claimant's dock coming upon it with considerable force bow on, at right angles. The dock was a narrow structure, resembling a trestle, running approximately one mile from the Jersey shore into New York Harbor to a point about 1,000 feet southwest of Bedloe's Island. No part of it jutted out into the navigable channel: for 750 feet it ran parallel to, and formed the boundary of, the so-called northwest channel. It had no audible signal devices. It is agreed that its three red navigation lights were not visible through the fog. Since the dock was used as a fueling station for ships there were floodlights on the dock for use in night loading. At no time before the incident were these lights turned on.

The normal courses of the Mayfair on a return trip were southwest in Bedloe's Island channel approximately 500 feet, thence southeast in the so-called northwest channel and parallel to the claimant's dock and beyond to the main channel of New York Harbor, and thence in the main channel northeast to the Battery. Two buoys marked the intersection of the Bedloe's channel and the northwest channel but neither offered any aid to navigation in fog.

On March 31, 1953, petitioner filed an *ex parte* petition for limitation of liability. The petition was granted and an order was filed pursuant to which a stipulation and *ad interim* bond for $15,000 in the usual form were filed. An

order was also entered which restrained the commencement of other suits.

The claimant disputed the Mayfair's value and a reference was ordered. The Commissioner found the Mayfair's value to be $30,000. Both parties filed exceptions but the Commissioner's report was confirmed. The claimant then moved for an order requiring petitioner to increase its *ad interim* stipulation. This order was issued but petitioner refused to comply. The claimant then moved before Judge Ryan for a decree *pro confesso*. Judge Ryan ruled that the default was not "so wilful" as to warrant a decree *pro confesso*. Instead, he granted claimant the right to prosecute its claim by libel in a new action or in the pending limitation proceeding. Also, Judge Ryan ordered that petitioner be denied a limitation of liability and that the restraining order be vacated.

Petitioner's explanation for not meeting the increased stipulation was that petitioner was unable to raise any further funds on the Mayfair. But that certainly does not indicate that the ship was worth no more than $15,000. We hold that Judge Ryan's order, in so far as it denied petitioner limited liability, was proper: petitioner failed to abide by an admiralty procedure it had chosen. See Rules 51 and 52 of the Rules of Admiralty Practice, 28 U. S. C. A. In view of the conflicting evidence presented to the Commissioner, we find nothing to warrant reversal of the $30,000 valuation.

The claimant contends that we should reverse Judge Ryan's refusal to grant claimant a decree *pro confesso* and should order such a decree. This would make it unnecessary for us to consider the claim on its merits. As to the petition for a decree *pro confesso* we think it clear that an admiralty court has the power to enter such a decree under the present circumstances. *The Greyhound*, 2 Cir., 68 F. 2d 832; *The Fred M. Lawrence*, 88 Fed. 910 (E. D. N. Y.), aff'd

94 Fed. 1017; *The Stella R*, 1 F. Supp. 998 (S. D. N. Y.). But even so we are reluctant to say that Judge Ryan's refusal to grant the decree *pro confesso* was an abuse of discretion and a definitive disposition of that question is unnecessary because we are satisfied that on the merits the claimant is entitled to prevail as we shall now proceed to show.

At the hearing before Judge Palmieri most of the evidence related to what happened during the 10 or 15 minute interval between the time the fog returned and the Mayfair's collision with the claimant's dock. The petitioner contended that the Mayfair had turned off its engines and had drifted into the dock. It asserted that claimant was liable for not having answered the Mayfair's fog signals and also because it failed to turn on its floodlights. The claimant introduced evidence showing that the current was running in a northeasterly direction—from the dock toward Bedloe's Island. The current and the physical incidents of the collision support the finding that the Mayfair did not drift into the dock.

Judge Palmieri found that the Mayfair was under some power at the time of the impact and under the circumstances was at fault on that account. He noted that even if the facts were otherwise and the collision were attributable to drift, the Mayfair was at fault for failure to ascertain and counteract the drift by lead line and anchor. The evidence was such that Judge Palmieri's findings were not clearly erroneous. Fed. Rules Civ. Proc., Rule 52(a). And the conclusion of negligence based upon the findings was right. This case is quite similar to *Pennsylvania R. Co.* v. *Central R.R. of New Jersey*, 103 F. 2d 428, cert. den. 308 U. S. 591, where this court held that a ferry moving in fog was solely liable for hitting a stationary barge anchored at the end of a pier and, also, that the barge had no duty of returning audible signals to the ferry.

Petitioner relies essentially upon *Erie & Western Transp. Co.* v. *City of Chicago*, 7 Cir., 178 Fed. 42. However, that case is distinguishable in two important respects. There, the dock projected directly into the navigable channel: in our case claimant's dock is merely a boundary of the channel and at no point juts into the channel. Secondly, in the *Erie* case an audible fog signal had previously been mounted on the dock but the bell had been removed from its moorings prior to the night of the collision. In the instant case claimant's dock, as the Mayfair's master undoubtedly knew, has never been supplied with audible signals, the silence of which might have misled the master. And we know of no rule of law that the claimant was under a duty to keep its dock illuminated by its loading lights. The petitioner's contention that claimant's dock constituted a menace to navigation is utterly lacking in support in the record.

Although the issue of damages in this case does not appear to be overly complex, we cannot say that the court below abused its discretion in ordering a reference of the issue especially in view of the recognized admiralty practice. It is significant that the Admiralty Rules contain no counterpart of F. R. C. P. 53(b). Since the interlocutory decree contains no provision dealing with questions relating to the measure or the amount of damages, such questions are not reviewable at this stage.

The petitioner further urges that it should not pay interest for the period covered by the pendency of claimant's unsuccessful appeal from Judge Ryan's order. This contention we sustain. Although the award of interest is generally within the discretion of the trial court, *O'Donnell Transp. Co.* v. *City of New York*, 2 Cir., 215 F. 2d 92, a long delay in pressing for trial may affect that discretion. *The Wright*, 2 Cir., 109 F. 2d 699. Here, the claimant sought to appeal in this court from an order which was plainly unappealable.

227 F. 2d 509. It also sought, but to no avail, certiorari and mandamus in the Supreme Court. 351 U. S. 917. The cross-appeals taken by the petitioner were plainly protective; and since, if the claimant had prevailed on its appeal, there would have been no trial, the petitioner cannot justly be charged with dilatory conduct in failing, during the pendency of the appeal, to press for trial below. Under these circumstances we hold that the trial court should not have allowed interest for the period from January 25, 1955, when the appeal was filed, until April 30, 1956, when the Supreme Court refused to hear the case. Since the order appealed from provided for interest and the petitioner, on trial, admitted that the collision resulted in "some damage," we have jurisdiction under 28 U. S. C. A. §1292(3) to make this ruling at this stage.

Affirmed, except as modified with respect to the allowable interest.

Statutes Involved.

LIMITATION OF VESSEL OWNER'S LIABILITY (pertinent sections)

"*46 U. S. C. A. Sec. 183(a), as amended.* The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"*46 U. S. C. A. Sec. 185, as amended.* The vessel owner within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall post with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

Statutes Involved.

"*28 U. S. C. A. Supreme Court Admiralty Rule 51—Limitation of liability—how claimed* (portions not relevant to the issue and questions are omitted). The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled 'An Act to limit the liability of shipowners and for other purposes' (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U. S. C. A. Secs. 183-189) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; * * * the value of the vessel at the close of the voyage * * * and the amount of any pending freight recovered or recoverable. * * * With his petition the petitioner may, if he so elects, file an ad interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage * * * and any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation and costs.

If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to the value of the vessel, * * * and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, * * * and her freight shall make an order for the payment of the same into court, or for the giv-

ing of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel * * * and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon * * *; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, *or* upon determination of value by appraisal and compliance with the court's order with respect thereto, *or* upon compliance with a surrender order, as the case may be, the Court shall issue a monition, (etc.) * * *"

"*28 U. S. C. A. Supreme Court Admiralty Rule 52*

"* * *

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception controverting the value of the vessel at the close of the voyage * * * and the amount of her pending freight and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel * * * and her freight; * * *"

Statutes Involved.

"28 U. S. C. A. Supreme Court Admiralty Rule 46—Evidence—how taken.

"In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. * * *"

"28 U. S. C. A. Supreme Court Admiralty Rule 43—Reference to commissioners.

In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises."

"28 U. S. C. A. Federal Rules of Civil Procedure, Rule 53(b)—Masters.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

WILLS LINES, INC.,

Petitioner,

against

TANKPORT TERMINALS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

HARRY D. GRAHAM,
Counsel for Petitioner,
76 Beaver Street,
New York 5, N. Y.

PETITIONER'S REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

1. *Collision Liability.*

The issue, as stated in the petition, is one solely of law. Its holding, as well as the Court of Appeal's, that because the "MAYFAIR" was under some power at the time of, or immediately prior to, the impact she was "at fault on that account" and, therefore, "a conclusion of negligence was right", is simply a ruling of negligence, *per se.* Claimant studiously avoids the leading case upon this point, *Casement* v. *Brown,* 148 U. S. 615, cited by petitioner in support, and with which the District Court, as well as the Second Circuit's decision, is in conflict. For, as said by this Court in *Casement* v. *Brown, supra,* cited by the Seventh and Sixth Circuits in support of the decisions cited in the petition,

> "the fact that, in this case, they miscalculated the exact location of the submerged pier does not subject them to the condemnation of negligence.
>
> * * * * * *
>
> While it is true the findings state that the pilots knew where the piers are located, and to what extent the work had progressed, having been in the habit of passing there twice a week during the construction, yet it is not to be assumed therefrom that the Court meant to find that these pilots knew the exact height to which Pier 'D' had been carried, the exact stage of the water at the time * * * and also its exact location in the river."

And so, in the case at Bar, there is no question, and never has been, that the Master, who had passed the respondent's structure upon thousands of occasions, knew the general location of the structure. In *Casement,* the structure

was obstructed from view in *clear* weather by being submerged beneath the water and with no markings upon it. In the case at Bar, the structure was obstructed from view by the dense fog and had no markings upon it to warn navigators in the area of its precise location relative to their vessels.

Under such circumstances, the fact that the Master of the "MAYFAIR" judged his vessel's position relative to the structure, erroneously does not spell out negligence as a matter of law. As in *Casement,* his appraisal of the relative position of respondent's hidden structure to the "MAYFAIR" is nothing more than an error in judgment, and is not negligence, much less negligence *per se.*

By failing in its duty,

"to give all *needful warning* to persons and boats"

in the area during the dense fog, having recognized the necessity of doing so in clear weather, the respondent assumed the risk of collision with its fog-hidden structure by vessels in the area.

It is respectfully submitted that a clear conflict between the Second Circuit's ruling of law herein, and this honorable Court's ruling in *Casement, supra,* as well as the other Circuits cited, exists and is an important ruling of law that should be reconciled by this honorable Court.

2. *Substance vs. Procedure—Limitation of Liability.*

At page 11 of its brief in opposition, respondent contends that there is no reason for granting certiorari here because the law is perfectly clear and no conflict exists.

That a clear, distinct, conflict exists between the decision of the Second Circuit in the case at Bar, and this Court's decisions and that of the Seventh Circuit, has been clearly shown.

In *Ohio Transp. Co.,* 203 U. S. 593, cited by petitioner in the petition, the record on file in this Court, No. 486, Octo-

ber Term, 1906, reveals that the petition for limitation in that case is identical in form with the petition for limitation in the case at Bar.

In the *Ohio Transp. Co.* case, *at the request of the petitioner,* the Court appointed three maritime appraisers for the purpose of appraisement of the vessel and her freight.

In the case at Bar, upon *application of the respondent,* the Court appointed *a lawyer* as a "Special Commissioner" to appraise the value of the "MAYFAIR" and her freight.

In the *Ohio Transp. Co.* case, the three marine appraisers fixed the value of the vessel and freight at $66,678.67 and, before any steps were taken to confirm that appraisement and order payment of said sum into Court, the petitioner sought leave to amend its petition and surrender the vessel and her pending freight to a Trustee to be appointed by the Court.

In the case at Bar, as soon as petitioner learned that the "Special Commissioner" was opening hearings (R. 4), petitioner promptly noted its objection to such proceedings, seeking an adjournment so that formal application to the Court for leave to amend the petition and surrender the "MAYFAIR" and her freight to a Trustee, could be made (R. 5, 6). This was denied by the "Special Commissioner" and, over petitioner's objections, he continued with the initial hearing. The motion for leave to amend the petition and to surrender the "MAYFAIR" and her pending freight was filed before the "Special Commissioner" resumed with his second hearing (R. 70) and, upon that hearing, despite the pendency of the motion, the "Special Commissioner" refused to adjourn pending the Court's ruling thereon.

In the *Ohio Transp. Co.* case, as stated by the Seventh Circuit (148 Fed. 187), when the petitioner made application for leave to amend and surrender its vessel and freight, *after* appraisement by the three requested marine appraisers, it thereby

> "apprised the Court that the owner was dissatisfied with, and proposed to withdraw from, the method of surrender through appraisement. By granting leave to file these (the amended petition) the Court *recognized the owner's right, before appraisement was accepted by him or acted upon by the Court,* to dismiss that part of the petition which asked for an appraisement and to substitute therefor the method of transfer to a trustee. *Of the petitioner's right to dismiss before any order is made on an unaccepted appraisement, we have no doubt.*" (Emphasis supplied.)

In the case at Bar, the "Special Commissioner" had not yet appraised the "MAYFAIR" and the District Court (A-1), phrased the issue before it on petitioner's application for leave to amend and surrender, viz.:

> "In short, what the petitioner is seeking is leave to substitute surrender of the vessel and her freight for the ad interim stipulation previously filed. The question presented is whether by filing the order for the ad interim stipulation and the stipulation for value the petitioner has irrevocably elected this form of limitation of liability."

The District Court, in the case at Bar, held in the affirmative as did the Second Circuit, clearly in direct conflict with the Seventh Circuit's *Ohio Transp. Co.* case, *supra,* in which this Court denied certiorari. The contention of the claimant in the *Ohio Transp. Co.* case, when seeking certiorari, was that,

> "to allow surrender in lieu of payment into Court or giving security for payment of value 'as duly ascertained' in this proceeding, *would not be compliance with the statute.*"
>
> (Pet. No. 486, Oct. Term, 1906, p. 4.)

Thus, the Seventh Circuit holds that the petitioner, *without any doubt,* has the *right* to substitute surrender

of its vessel in lieu of accepting an appraisement while, in the case at Bar, the ruling is precisely to the contrary holding the petitioner to an *irrevocable* election of a manner of proceeding.

The Second Circuit's ruling is also in direct conflict with this Court's ruling in the *Scotland*, 105 U. S. 24, cited by petitioner in its petition, and wherein this Court has firmly stated:

> "* * * we may say, once and for all, that they (Rules 51-54) were not intended to restrict parties claiming benefit of the law, but to aid them."

3. *Compulsory References in Admiralty.*

Respondent studiously avoids this Court's decisions on the subject cited in the petition and with which the Second Circuit's decision is in direct conflict as there shown.

4. *The Commissioner's Yardstick of Evaluation.*

Respondent has been unable to point to this record at any place and single out one iota of competent evidence to support the opinions of its alleged "experts", which the "Special Commissioner" found to be "impressive". Nor, does it deny the plain, recorded, fact that comparable sales of about six other vessels, prorated to the "MAYFAIR's" age, show an average market value of $9,500.00, while cost, plus improvements, less depreciation; bring a value in the neighborhood of $9,000.00—figures which correspond with that offered by the ordinary businessman in the trade, the successful outbidder to petitioner for the franchise operation (Pet., p. 25).

The Second Circuit affirmed the District Court's confirmation holding that,

> "In view of the conflicting evidence presented to the Commissioner, we find nothing to warrant reversal of the $30,000.00 valuation."

As this Court has repeatedly stated, a finding is clearly erroneous when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, *United States* v. *Oregon Medical Society*, 343 U. S. 326; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395; *Mc Allister* v. *United States*, 347 U. S. 932; 1954 A. M. C. 1999, 2001.

For evidence to support a finding, the evidence must be competent, admissible and binding, but nowhere in the Commissioner's report, MAYFAIR, 1954 A. M. C. 977, or in the respondent's brief in opposition, do either single out any competent evidence in support of the finding.

Where an ancient 75-year old vessel costing $15,500.00 in 1947, is valued at $30,000.00 seven years later, in a declining market and when, as the record shows, she is idle and unemployed—an increase of value making a total of approximately 200% of the original, or more if depreciation is considered—the result cannot leave any reasonable doubt that a mistake has been committed.

The ruling of the Second Circuit, in effect, holds that *any* evidence is competent and admissible for the purpose of reviewing the sufficiency of evidence to support a finding.

This, it is respectfully submitted, conflicts with the decisions of this Court, *supra*.

Summary

The conflicts shown in the petition and in this reply brief, embrace the field of admiralty law and procedure and the wide-spread interests of the shipping industry, the vessels and navigators of all nations using our waters, the owners and operators who may be drawn into the jurisdiction of our admiralty courts as a result of events happening in the course of commerce in this nation and its waters. As such, these conflicts are real and embarrassing, of

public importance to both industry and the admiralty courts and should be resolved by this Court for the guidance of both the admiralty courts and the vast shipping interests.

CONCLUSION

For all of the reasons stated in the petition, and herein, a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

HARRY D. GRAHAM,
Counsel for Petitioner.

Dated, April 15, 1958.

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OCTOBER TERM, 1957

No. 876

In the Matter of the Petition

of

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for exemption from, or limitation of, liability,

Petitioner,

TANKPORT TERMINALS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR TANKPORT TERMINALS, INC. IN OPPOSITION

MAURICE A. KRISEL
Counsel for Respondent
27 William Street
New York 5, N. Y.

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BRIEF FOR TANKPORT TERMINALS, INC. IN OPPOSITION

Opinions Below

The decision of the District Court (petitioner's supplemental appendix, pp. 24a-30a) on the issue of liability is unreported. The order of the District Court (record, pp. 398-399) denying petitioner's motion to vacate the order of reference to appraise the MAYFAIR appears in petitioner's appendix at pages 10a-11a. The order of the District Court (Clancy, *J.*) overruling exceptions to the Commissioner's report on the issue of valuation appears in the record at pages 476-478. The opinion of the Court of Ap-

peals for the Second Circuit (petitioner's appendix, pp. A3-A9) is not yet reported.

The opinion of the District Court (petitioner's appendix, p. A-1) denying petitioner's motion to surrender the MAYFAIR is unreported. The order of the Court of Appeals for the Second Circuit (petitioner's appendix, p. A-3) summarily affirming the District Court is unreported.

The decision of the Court of Appeals dismissing appeals for lack of jurisdiction is reported at 227 F. (2d) 509; cert. den. 351 U. S. 917.

Jurisdiction

Jurisdiction with respect to the order of October 8, 1953 is lacking for untimeliness. Jurisdiction over the other issues is under 28 U. S. C. 1254(1).

Questions Presented

1. Whether this Court will review the concurrence by the court below in the Trial Court's conclusion of negligence and the findings of fact upon which it was based, the resolution of which facts was in large part dependent upon an appraisal of the credibility of the witnesses appearing before the District Court and upon the weight to be given to conflicting evidence in a negligence case.

2. Whether in the absence of any regulation requiring owners of docks, approved by the Army Engineers and the Secretary of War, to sound fog signals, it is advisable for the courts to intervene and impose such a regulation before some authority competent to deal with the subject determines whether such regulation will be a help or hindrance to navigation.

3. Whether a ship owner, in a limitation of liability proceeding, who proceeds by filing an *ad interim* stipulation and obtains an injunction against all possible claimants thereby receiving all the benefits of such procedure may then be permitted to surrender the vessel in substitution for the *ad interim* stipulation and the valuation method of procedure.

4. Whether a party who has consented to a reference to fix the valuation of a vessel in a limitation of liability proceeding may thereafter attempt to avoid such reference and whether a District Court is precluded from referring the issue of damages to a Commissioner in spite of the long practice of doing so in such cases in accordance with this Court's Admiralty rules.

5. Whether this Court should interfere with the affirmance by the Court below of the District Court's confirmation of the Commissioner's valuation of the MAYFAIR based on conflicting evidence and decided in accordance with the principles laid down by this Court in valuation cases.

Statutes and Rules of This Court Involved

The statutes and rules involved are 46 U. S. C. 183(a) and 185 and Admiralty Rules 43, 43½, 51 and 52 of this Court.

Statement

A. Liability for the casualty.—The District Court, sitting in Admiralty, after seeing and hearing the witnesses, issued its findings of fact and conclusions of law holding petitioner solely liable for the damages occasioned to the dock, of which respondent Tankport Terminals, Inc., was

the lessee in possession when it was struck by petitioner's motor vessel MAYFAIR on January 15, 1953 at about 8:15 p. m. The Court below affirmed the findings of the District Court and held that the District Court's "conclusion of negligence based upon the findings was right" (A, p. A7).* The only witnesses to the collision were members of the crew of the MAYFAIR and the facts with respect thereto necessarily had to come from the petitioner's witnesses.

The following facts appear in the opinion below, the findings of the District Court (concurred in by the Court below) and the record:

"At about 8:00 p. m. on January 15, 1953, with the mate with him in the pilothouse and a seaman on bow lookout, the Master warped the MAYFAIR around the head of the Bedloe's Island dock until her prow was in the usual alignment with the Bedloe's Island channel on a southwesterly heading.

"The MAYFAIR had just commenced to gain headway at a speed of approximately three knots when it was enveloped suddenly by dense fog which afforded no visibility. The Master posted appropriate lookouts and blew his whistle in long blasts at one-minute intervals. The testimony and available evidence of the maneuvers of the vessel between this time and the moment of impact with claimant's pier 10 to 15 minutes thereafter are neither clear nor convincing. I am convinced, however, that at the moment of impact, or immediately before, the vessel

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* Pet. Ap.—refers to Petitioner's Appendix in the Court below;
Pet. Supp. Ap.—refers to Petitioner's Supplemental Appendix in the Court below;
A.—refers to the Petitioner's separate appendix;
RA.—refers to Respondent's appendix included in its brief to the Court below;
R.—refers to the original record.

was under power and was proceeding in an improper direction at slow speed and that this was the proximate cause of the collision with claimant's pier. Assuming, as the captain testified he ascertained at the time of impact, that the ship was drifting for 10 to 15 minutes immediately prior to the moment of impact, his failure to drop a lead line or to take other precautions to ascertain and counteract drift, was an act of negligence which constituted a proximate cause of the casualty. The failure of the master to stop the vessel and avoid further navigation and prevent movement of his vessel until the fog lifted were proximate causes of the casualty.

"On the evening of January 15, 1953, at about 8:15 p. m., the MAYFAIR collided with the northerly side of the aforesaid dock at a point about 500 feet inshore from the sea end of the dock, penetrating the said dock for a distance of five to six feet with her stem and bow, causing damage to the dock and the loss of petroleum products. • • • (Pet. Supp. Ap. 28a-29a.)

"The dock of Tankport Terminals, Inc. was properly situated, conducted and maintained" (Pet. Supp. Ap., p. 30a). "• • • No part of it jutted out into the navigable channel • • •. The petitioner's contention that claimant's dock constituted a menace to navigation is utterly lacking in support in the record" (A., pp. A5, A8).

At the time of the collision, "the current was running in a northeasterly direction from the dock toward Bedloe's Island" (A., p. A7); that is, the MAYFAIR had to proceed against the current to contact the dock.

"• • • the Mayfair collided with the claimant's dock coming upon it with considerable force bow on, at right angles" (A., p. A5), as a result of which "the dock sustained serious damage" (Pet. Supp. Ap. 29a). The force

of the collision was sufficient to push the dock office some 15 or 20 feet (R., p. 2a), cut in half one 14 inch pipe line, flatten a 10 inch pipe line, bend two 6 inch pipe lines, and sever a 4100 volt power line, as well as other service lines, such as water, telephone and fire alarm system (R. 566; see photographs, exhibits 5A to E). The impact was of such nature that even though the MAYFAIR had an iron hull (R. 447), her master immediately dispatched a man onto the dock to see whether she had been "holed" or "punctured" (Petitioner's Brief below, pp. 7 and 13).

B. Facts dealing with petitioner's election to file an *ad interim* stipulation.—Following the collision on January 15, 1953 petitioner as owner of the MAYFAIR filed its petition in the District Court on March 31, 1953 for exoneration from or limitation of liability (R. 286-292a; Tankport Terminal's appendix below, pp. 20a-26a) praying that due appraisement be made of its interest in the MAYFAIR and pending freight; that the Court make an order directing petitioner to file a stipulation with approved surety for the payment into Court of the amount of the petitioner's said interest; that the Court make an order directing the issuance of a monition to all persons claiming damages and, that the Court make an order directing that upon the giving of such stipulation as may be determined to be proper or of an *ad interim* stipulation, an injunction issue restraining the prosecution of all suits arising out of the accident in question except in the present proceeding.

On the same day, based on affidavits presented to establish the value of the vessel, the District Court ordered an *ad interim* stipulation to be filed in the sum of $15,056.25 and further ordered that any party might apply to have the amount of said stipulation increased or diminished as the case might be, upon the filing of the report of the Com-

missioner appointed to appraise the amount of the value of petitioner's interest in said vessel, or upon the ultimate determination of the Court upon exceptions to the Commissioner's report (Tankport Terminal's appendix below, pp. 7a-8a). Also upon the same day, upon application of petitioner, the District Court entered an order restraining all suits except in this proceeding (Tankport Terminal's appendix below, pp. 9a-11a).

Thereafter on May 15, 1953 an order was entered on consent of petitioner referring the matter of appraising the value of the petitioner's interest in the MAYFAIR to a Commissioner (Tankport's supplemental appendix below, pp. 13a-14a). Following the entry of this order respondent on July 30, 1953 brought on for hearing before the Commissioner the issue of the appraisal of the MAYFAIR. Petitioner then moved to amend its petition and for an order appointing a trustee to take title to the MAYFAIR in substitution for the *ad interim* stipulation already filed in this proceeding. This motion was denied by order dated September 29, 1953 (A., p. A1) and summarily affirmed by the Court below on October 8, 1953 (A., p. A2). By petition dated October 28, 1953, petitioner in this Court filed an "application for stay pending certiorari proceedings" which was denied by Mr. Justice Jackson on November 3, 1953. Petitioner did not thereafter file a petition for a writ to review the order of October 8, 1958 of the Court below nor did it take other steps to appeal from this order and, the time to do so has now long expired.

C. The Valuation of the MAYFAIR.—The Court below stated that "in view of the conflicting evidence presented to the commissioner, we find nothing to warrant reversal of the $30,000 value" (A., p. A6).

The Commissioner after hearing the testimony of the witnesses that appeared before him came to the conclusion

that the value of the MAYFAIR as of January 15, 1953 was $30,000; his report appears in petitioner's appendix below (pp. 12a to 19a). The Commissioner in arriving at his conclusion properly applied the principles laid down by this Court in *United States* v. *Toronto, Hamilton and Buffalo Nav. Co.*, 338 U. S. 396 (Pet. ap. 13a) to the facts presented to him.

A few of the facts presented disclosed that "the MAYFAIR was mortgaged to the Reconstruction Finance Corporation together with the other vessels involved in the Statue of Liberty run for a total of $245,000 of which $40,000 was allocated to the MAYFAIR" and that the "MAYFAIR earned between $15,000 and $24,000 per year" (PA., p. 17a).

Argument

1. *Petitioner's liability for the collision.*—The issue of whether the petitioner was negligent in colliding with the dock was based on questions of fact, the resolution of which depended in part on an appraisal of the credibility of the witnesses that appeared and testified before the District Court and upon an evaluation of certain conflicting evidence.

The moving MAYFAIR having come into contact with the dock, a fixed object, a presumption of fault arose against her and imposed on petitioner the duty to come forward with evidence to meet the presumption. (*Wetmore* v. *The Granite States*, 3 Wall. (70 U. S.) 310, 314; *Clarence P. Howland* (2 Cir. 1926), 16 F. (2d) 25; *Koch-Ellis etc.* v. *Sewerage & Water Board* (5 Cir. 1955), 218 F. (2d) 771, 772 note 3 (2); *Carr* v. *Hermosa Amusement Corporation Limited*, 137 F. (2d) 983, 985.) This rule is equally applicable where the casualty occurs during fog. (*The*

Providence (2 Cir. 1933), 67 F. (2d) 865; *P. R. R. No. 457*, 25 F. Supp. 846, 846-7, modified (2 Cir.), 103 F. 2d 428 cert. den. 308 U. S. 591; *P. R. R. No. 5* (2 Cir.), 181 F. 833.)

Although under an obligation to rebut the presumption arising in the circumstances, the only explanation made by petitioner was that the MAYFAIR was brought into collision with the dock by drifting with the currents and eddies and that this condition was not, and could not have been ascertained by the master. That she could have drifted into a dock against an adverse current, is physically impossible; and even if she were drifting, this could have been readily ascertained and stopped by dropping her anchors, or counteracted by using her engines (A., p. A7).

The MAYFAIR's master repeatedly asserted that he was stopped in the water and did not know he was moving (RA., 9a-10a). It is implicit in his evidence that he should not have been moving at all under existing weather conditions. A former Coast Guard officer called by petitioner testified that any drift could have been ascertained by the use of a lead line and controlled by the use of the vessel's anchor and engines and that under existing conditions the MAYFAIR should have dropped her anchor (RA. 11a-14a). The Court below concurred in the District Court's findings based on this testimony (A., p. A7).

Title 33 U. S. C. 192 contains the following:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

This statute and its counterpart in the International Rules (33 U. S. C. 145m) have been interpreted in numerous decisions to mean that during fog a vessel must proceed no

faster than will permit her to stop within the distance of visibility. (*The Nacoochee*, 137 U. S. 330, 339; *The Chattahoochee*, 173 U. S. 540, 548; *The Southern Cross* (2 Cir. 1937), 93 F. (2d) 297, 299; *The Providence* (2 Cir.), 67 F. (2d) 865; *The P. R. R. No. 5* (2 Cir. 1910), 181 F. 833; *P. R. R. No. 457*, 25 F. Supp. 846-7, modified (2 Cir.) 103 F. (2d) 428, cert. den. 308 U. S. 591.) "The force of the collision and the damage done would indicate excessive speed, considering the fog" (*N. Y. C. R. Co.* v. *City of New York*, 19 F. (2d) 294, 295; see also *The Youngstown*, 40 F. (2d) 420, 421).

This rule for speed in fog applies as well to ferries as to other vessels. (*Penn. R. R. Co.* v. *C. R. R. of N. J.*, 103 F. (2d) 428, 429, cert. den. 308 U. S. 591.) To the same effect, see *The Providence, supra; New York Central R. Co.* v. *New York, supra; The Youngstown, supra.* The adverse current and physical incidents of the collision support the conclusion that the speed of the MAYFAIR was negligent in view of the existing conditions.

Under petitioner's second question, it argues that the dock should have been so equipped as to give out some audible signals during fog. We know of no requirement either by statute or admiralty law which requires a dock owner to sound a signal (see *P. R. R. No. 457, supra*). It is not suggested whether the required signal should be by whistles or bells as required of vessels during fog (33 U. S. C. 191). However, it seems obvious that if every dock owner in New York Harbor sounded the bells required of vessels at anchor, it would result in hopeless confusion to navigation since a moving vessel would not know whether she was approaching a vessel in the channel or a dock.

2. *Petitioner is precluded from using the method of surrendering the vessel as security after having elected to post*

security for the vessel and obtaining an injunction and all the benefits arising out of this method of procedure.—We believe that the time within which the petitioner may ask for a review of this issue has long expired; it failed to request a review of the affirmance by the Court below of the District Court's denial of its motion, after making an application to this Court to stay the hearings before the Commissioner pending an application in this Court for a writ. But even if petitioner is not precluded from raising the issue at this time, the Court below properly passed on this issue.

There appears to be no reason for granting certiorari in this case as the law is perfectly clear. The statute (49 Stat. 1480, 46 U. S. C. 185) declares that a petitioner seeking the benefits of the Limitation of Liability Statute has the option of either filing security to the extent of the owner's interest in the vessel or of surrendering the vessel to a trustee appointed by the Court. A petitioner must choose which course of action it wishes to follow and once it has done so, "all claims • • • against the owner • • • shall cease" and consequently the election becomes irrevocable.

There is no conflict between the decision of the Seventh Circuit in *Ohio Transp. Co.* v. *Davidson SS. Co.* (1906), 148 Fed. 185, cert. den. 203 U. S. 593, and the decision of the Second Circuit in the *Ontario No. 1*, 80 F. (2d) 85. In fact, the decision of the Second Circuit in the *Ontario* case, as can be seen at page 87, relies in part upon the dictum in the Seventh Circuit case. See also *In re Morrison*, 147 U. S. 14; *H. F. Dimock*, 52 F. 598. Whatever doubt there may have been on this point prior to the decisions in both the *Ohio Transp. Co.* and *Ontario* cases was completely dispelled by the amendment to the statute (46 U. S. C.

185) in 1936, which explicitly codified the rule of irrevocability enunciated in the *Ontario* case.

3. ***Petitioner may not object to a reference on the valuation issue to which it consented nor is the Trial Court precluded from referring the issue of damages to a Commissioner.***—The order of reference to the Commissioner, dated May 15, 1953, was granted "upon consent" (Tankport's Sup. App. below, p. 13a). In addition the proceedings instituted by the petitioner contemplated the appointment of a Special Commissioner to fix the value of the M/V MAYFAIR for limitation purposes (see "Wherefore" clause in petition, R. 286-292a); *ad interim* stipulation (R. pp. 296-7).

The District Court has power and jurisdiction both to order the appointment of a Special Commissioner for the purpose of assessing the value of a vessel in a limitation proceeding as well as for the purpose of assessing the damage following an interlocutory decree. (Supreme Court Admiralty Rules 51 and 52, and 43 and 43½; *Weeks Crane No. 3*, 1935 A. M. C. 549 (not otherwise reported); *Morrison* v. *District Court of the United States*, 147 U. S. 14, at p. 20; *United States* v. *Kirkpatrick*, 186 F. 2d 393, 398; *The Dona Aurora* (2 Cir.), 206 F. (2d) 651, 7; 3 Benedict on Admiralty (6th Ed.) Sec. 500, pp. 432-433.)

4. ***The Court below properly affirmed the District Court's order sustaining the Commissioner's value of the MAYFAIR at $30,000.***—The Commissioner applied to the facts the principles laid down by this Court in *U. S.* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396 (see Commissioner's report PA., p. 13a).

Petitioner's major complaint is that the Commissioner disregarded the evidence with respect to acquisition cost

of the MAYFAIR and comparative sales of other vessels. However, the following appears in the Commissioner's report: "In determining her value, I have considered the following: 1. cost to the petitioner, plus improvements, less depreciation; 2. sales of other vessels • • • " (PA., p. 14a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURICE A. KRISEL
Counsel for Respondent
27 William Street
New York 5, N. Y.